UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

Northeastern Industrial Contracting, Inc.

Employer

and

Empire State Regional Council Of Carpenters, Local 1042[1] **Case 3-RC-11589**

Petitioner

and

Builders, Woodworkers & Millwrights, Local Union No. 1

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to Section 9(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, and having considered the briefs submitted by the Petitioner and Intervenor,[2] I find:

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The parties stipulated that Northeastern Industrial Contracting, Inc. is a New York State corporation, which provides industrial contracting services from its Plattsburgh, New York

[1] The Petitioner's name appears as amended at the hearing.
[2] The Employer did not submit a post-hearing brief.

facility. Annually, the Employer purchases and receives at its Plattsburgh, New York facility goods, valued in excess of $50,000, directly from points located outside the State of New York. Based upon the parties' stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The parties stipulated, and I find, that Empire State Regional Council of Carpenters, Local 1042 ("Petitioner") is a labor organization within the meaning of Section 2(5) of the Act.

The parties stipulated, and I find, that Builders, Woodworkers & Millwrights, Local Union No. 1 ("Intervenor") is a labor organization within the meaning of Section 2(5) of the Act.

A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 2(6) and (7), and 9(c)(1) of the Act.

ISSUES

On March 30, 2005, Petitioner filed a petition seeking to represent "all carpenters, carpenters helpers and apprentices" employed by the Employer at its Plattsburgh, New York facility.[3] Intervenor contends that the petitioned-for unit is inappropriate because it is not a "verbatim" recitation of the unit described in the June 1, 2002 to March 31, 2006 collective-bargaining agreement between the Intervenor and Employer ("Contract"). The Intervenor further contends that the petition should be dismissed under the Board's contract bar rule. The

[3] Although the Petitioner does not expressly include millwrights in the unit description of the petition, the Petitioner clearly expressed its intent to include millwrights in the petitioned-for unit, as discussed herein.

Employer and Petitioner contend that the Petitioner seeks to represent a unit identical in scope to the unit described in the Contract and that the contract bar rule is inapplicable. Finally, Intervenor contends that Petitioner previously ceded its right to represent millwright employees. After carefully considering the record and the parties' arguments, I find that the petitioned-for unit, as modified herein, is appropriate, there is no impediment to Petitioner representing millwright employees in the unit found appropriate, and the contract bar rule is inapplicable to the petition herein.

FACTS

The Employer has operated as a general construction contractor for 19 years. Its major clients include Wyeth Pharmaceuticals, Georgia-Pacific Corporation and Pactiv Corporation. Depending upon business demands, its workforce ranges from 10 to 30 employees. At any given time, the Employer performs between 6 and 12 construction projects.

The current four-year Contract between the Employer and Intervenor is effective by its terms from June 1, 2002 through March 31, 2006. Article 2, *Bargaining Unit and Trade Jurisdiction,* of the Contract describes the unit as follows:

> [T]he Employer's employees employed as Builders; Carpenters and Joiners; Millwrights; Bench Hands; Stair Builders; Wood, Wire and Metal Lathers; Acoustic and Dry Wall Applicators; Floor Layers and Floor Coverers; Tile, Marble, and Terrazzo Workers and Finishers; Furniture Workers; Cabinet Makers; Casket and Coffin Makers; Box Makers; Reed and Rattan Workers; Bridge, Dock and Wharf Carpenters; Drivers and Tenders; Welders; Shipwright and Boat Builders; Ship Carpenters; Joiners and Caulkers; Railroad Carpenters; Car Builders; Pile Drivers; Underpinners and Timbermen; Shorers and House Movers; Loggers; Lumber and Sawmill Workers; and those engaged in the running of Woodworking machinery of any type, or engaged as helpers or tenders to any of the above categories or sub-categories of employment.

Unit terms and conditions of employment are governed by the Contract, including wages, hours of work, holidays, disciplinary procedures, fringe benefits, a grievance and arbitration procedure and various other terms and conditions of employment. Unit employees are paid on a weekly basis, have access to the same lunch and break area, and receive assignments from the same main office. With the exception of the marginally different wages paid to the five carpenter classifications,[4] unit working conditions and benefits are essentially identical.

Unit workers possess similar skills and are functionally integrated. Unit employees generally perform either millwright or carpentry work. Millwrights work primarily with metal (rather than wood), build and erect machinery, align equipment and perform other repair work. Millwrights use laser alignment machinery, hammers, jackhammers, scaffolding, drills and fastening equipment. Carpenters work primarily with wood, and erect wooden platforms and other structures. Most unit carpenters perform millwright work, and millwrights also perform carpenter work. Carpenters and millwrights often work together on jobsites in an integrated fashion. The Employer normally employs four supervisors. Depending upon the job, supervisors interchangeably supervise all unit and non-unit employees, without any distinction based on job classification.

ANALYSIS

The petitioned-for unit is appropriate. It is well-established that, "the Act does not require that the unit for bargaining be the optimum, or most appropriate unit, but only an appropriate unit." *Home Depot USA, Inc.*, 331 NLRB 1289, 1290 (2000). In determining whether a unit is appropriate, the Board evaluates whether the petitioned-for employees share a

[4] The Contract describes the hourly wage rates for the carpenter classifications. The carpenter journeyman receives $20.18 per hour, the carpenter journeyman (light duty) receives $15.14 per hour, the carpenter journeyman (residential) receives $15.14 per hour, the piledriver receives $20.33 per hour and the millwright receives $20.68 per hour.

sufficient community of interest. *Id*. When evaluating community of interest, the Board considers comparable working conditions, common supervision, similar fringe benefits, degree of skill and common functions, frequency of contact and interchange among employees, and functional integration. *Overnite Transportation Co.*, 322 NLRB 723 (1996)*; Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962).

A community of interest analysis demonstrates that the unit is appropriate. Carpenters, millwrights and apprentices share a strong community of interest, given that they are subject to comparable working conditions, have common supervision, receive similar wages and fringe benefits, possess common skills, serve common functions, enjoy frequent contact, and work together in an integrated manner. See *Overnite Transportation Co*., supra; *Kalamazoo Paper Box Corp*., supra. The unit's collective-bargaining history (as demonstrated by the Contract) further establishes that the unit is appropriate. *Red Coats, Inc.*, 328 NLRB 205 (1999); *Washington Post Co*., 254 NLRB 168 (1981). Finally, it is well-settled that carpenter, millwright and apprentice bargaining units are appropriate. See, e.g., *Calumet and Hecla Consolidated Copper Co.*, 86 NLRB 126, 130 (1949)("…the close association of millwrights and carpenters is characteristic of the two groups, and the Board has often found a unit of both to be appropriate for collective bargaining purposes."); *Remodeling by Ottmans*, 263 NLRB 1152 (1982); *Carbide and Carbon Chemicals Corp.*, 73 NLRB 881, 883 (1947).

Intervenor asserts that Petitioner cannot represent millwrights because the Petitioner previously conferred jurisdiction over millwrights to another labor organization, Millwrights Local 1163. Intervenor cites, in its brief, a July 20, 2001 letter from Petitioner's national general president to Petitioner's district vice-president, [5] in which Petitioner's parent union, the United

[5] Intervenor attached a copy of this letter to its brief. This letter is not part of the record and will not be considered herein.

Brotherhood of Carpenters and Joiners, reportedly conferred jurisdiction to represent millwrights in Petitioner's geographic area to Millwrights Local 1163. Millwrights Local 1163 is another local of the United Brotherhood of Carpenters and Joiners and the Empire State Regional Council of Carpenters, the Petitioner herein. Although the Intervenor made a cursory offer of proof concerning Millwrights Local 1163's jurisdiction, it did not offer the July 20, 2001, letter into evidence. More importantly, however, the Intervenor currently represents the millwrights and the millwrights are clearly denoted within the Contract's recognition clause. Petitioner, at the hearing, asserted its intent to represent the millwrights, notwithstanding the Intervenor's assertions that through some internal procedure the Petitioner previously waived its right to represent them. Nothing in the Act or Board precedent precludes Petitioner (i.e., a union that specializes in representing carpentry and millwright employees) from representing millwrights. Intervenor's reliance upon *Cocker Saw Co., Inc. v. NLRB*, 446 F.2d 870 (2d. Cir. 1971), in furtherance of its argument is misplaced. *Cocker Saw* reaffirms the Board's longstanding election bar rule, which provides that a new election cannot be held less than a year after a previous election. *Id*. *Cocker Saw* also holds that "an amendment to a certification is proper only to permit changes in the name of the representative, not to change the representative itself." *Id*. at 872. Finally, *Cocker Saw* holds that as a remedy for an employer's unfair labor practices, the Board may "order that the certification year recommence when the Company beg[ins] to bargain with the Union." *Id*. Thus, while *Cocker Saw* remains viable precedent for the

particular issues that the case addresses, *Cocker Saw* has no bearing on the issues in this matter. I reject Intervenor's arguments concerning Petitioner's inability, or unwillingness, to represent millwrights.

While the unit described in the petition is worded differently, it is, in substance, identical in scope and composition to the Contract unit. The Petitioner took the position at the hearing that the petitioned-for unit is identical in scope and composition to the Contract unit.[6] The Employer similarly acknowledges that the petitioned-for, and Contract, units are identical in scope and composition. Intervenor disagrees.[7] Given the Intervenor's failure to substantiate its position, and based upon the record as a whole, I find that the petitioned-for and Contract units are identical in scope and composition.

However, given that millwrights are a distinct trade, and in order to resolve the unit description issue, I shall specifically include millwrights in the Unit description. The express inclusion of millwrights in the Unit description is consistent with the record, the Contract and the parties' collective-bargaining history. I further conclude that the petitioned-for unit, as modified, is an appropriate unit for the purposes of collective bargaining.

I also conclude that the Contract does not bar the processing of the petition. Under the Board's contract bar policy, a contract may only bar a competing union's petition for up to three years. *General Cable Corp*., 139 NLRB 1123, 1125 (1962). A contract in excess of three years is treated, for contract bar purposes, as though it were only a three-year contract. Thus, regardless of a contract's length in excess of three years, a petition may be filed 90 to 60 days prior to the third anniversary date of the contract. *Dobbs International Services, Inc.*, 323 NLRB

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[6] Petitioner stated, "the petition is not seeking to fracture the [Contract] unit, what we [seek] … is the unit described in article 2 [of the Contract]."

[7] Although Intervenor was repeatedly requested by the hearing officer to explain its position, Intervenor refused to explain, or adduce any evidence demonstrating, how the petitioned-for and Contractual units are substantively different.

1159, 1160-61 (1997); *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000-1001 (1958); *General Cable Corp.*, supra. A petition also may be filed after the anniversary date of the third year of the contract, if no new agreement is reached during 60-day insulated period prior to the third year anniversary of the contract. *Id*. The instant petition was filed on March 30, 2005 (62 days before May 31, 2005, the third anniversary date of the Contract), thus, the petition is timely.

Although Intervenor contends that the Contract's execution date (June 10, 2002) is the operative date for contract bar purposes, Intervenor is incorrect. Under Board precedent, the Contract's commencement date (June 1, 2002) is the operative date. *General Cable Corp.*, supra.

Given that the Employer is a construction contractor, the parties stipulated, and I find, that the *Daniel-Steiny* voter eligibility formula is applicable herein. *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967); *Steiny & Co.*, 308 NLRB 1323 (1992).[8] Furthermore, Intervenor requested, and I so find, that its name should appear on the ballot.

CONCLUSION

Based upon the foregoing, I find that the petitioned-for unit is appropriate. I also find that the petition is not barred under the Board's contract bar rule. Finally, I find that Petitioner can represent the millwrights if it is selected as the collective-bargaining representative of the employees in the unit found appropriate.

APPROPRIATE UNIT

[8] Accordingly, under the *Daniel-Steiny* formula, eligible to vote are those employees in the unit who were employed during the payroll eligibility period, all employees who were employed by the Employer for a total of 30 working days or more within the period of 12 months, or who have had some employment within that period and who have been employed 45 or more working days within a period of 24 months, immediately preceding the eligibility date for the election, shall be eligible to vote.

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time carpenters, millwrights, carpenters helpers and apprentices employed by the Employer at its Plattsburgh, New York facility; excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

There are approximately 30 employees in the unit found appropriate herein.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate, as described above, at the time and place set forth in the notices of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. In addition to those employees in the unit who were employed during the payroll eligibility period, all employees who were employed by the Employer for a total of 30 working days or more within the period of 12 months, or who have had some employment within that period and who have been employed 45 or more working days within the period of 24 months, immediately preceding the election eligibility date for the

election, shall also be eligible to vote. *Daniel Construction Co., Inc.*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967). Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **EMPIRE STATE REGIONAL COUNCIL OF CARPENTERS, LOCAL 1042** or **BUILDERS, WOODWORKERS & MILLWRIGHTS, LOCAL UNION NO. 1;** or by none of these labor organizations**.**

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to lists of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within **seven** days of the date of this Decision, **two** copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director of Region Three of the National Labor Relations Board who shall make the lists available to all parties to the election. In order to be timely filed, such list must be received at the Albany Resident Office, Room 342, Leo O. Brien Federal Building, Clinton Avenue and North Pearl Street, Albany, New York 12207 on or before May 5, 2005. No extension of time to file the lists shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. The Board in Washington must receive this request by May 12, 2005.

DATED at Buffalo, New York this 28th day of April 2005.

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HELEN E. MARSH, Regional Director
National Labor Relations Board – Region Three
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